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In The

Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA,

Petitioner,

v.

WHITING POOLS, INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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STATEMENT OF CASE

Petitioner's statement of the case is substantially accurate, though it makes some omissions which we wish to note for the Court.

In ordering the turnover at issue, the Bankruptcy Court below made several findings of fact that are not controverted, to wit:

1. Whiting's indebtedness to the IRS for unpaid employment taxes is approximately $92,000.00;

2. The seized assets have a going concern value of $162,876.00;

3. Other than the IRS tax lien, the only existing lien against the seized assets was a security interest owned by Marine Midland Bank in the amount of either $6,000.00 or $12,500.00.

4. Based on the above, the debtor has a substantial equity in the seized property.

5. Public sale of those assets by the IRS will yield a *maximum* of $30,000.00 — $35,000.00.

(App. B to Petition, 35a-36a). The Bankruptcy Court concluded, based on these findings, that "the seized property is absolutely necessary to an effective reorganization of the debtor" since "the debtor will cease to exist" once the sale occurs. (App. B to Petition, 36a). Accordingly, the Bankruptcy Court determined that turnover is in the best interest of the government, since the IRS would recover more on its tax claim from a successfully reorganized business than from a tax sale, and its interest could be adequately protected in the interim. These factual conclusions have not been disputed by the government.

SUMMARY OF ARGUMENT

The petition should be dismissed, or, in the alternative, the petition should be granted and the decision of the court of appeals affirmed summarily, for the following reasons:

1. Certiorari should be denied because the decision of the court below, while inconsistent with the decision of the Fourth Circuit in *Cross Electric Co. v. United States*, 664 F.2d 1218, (4th Cir. 1981), is not squarely in conflict therewith. The debtor in the case at bar, unlike the debtor in *Cross Electric*, has a substantial equity in tangible assets that can be used by the reorganized debtor while the interests of the government are adequately protected.

2. The construction placed on section 542(a) of the Bankruptcy Code by the court of appeals is supported by a clearly expressed legislative intent to encourage successful rehabilitation of business debtors. The literal construction urged by the government would have a disastrous impact on business reorganizations that could not have been intended by Congress since it is contrary to the purposes and policies of the Bankruptcy Code.

3. The plain meaning rule is inapplicable because the relevant statutes are ambiguous on their face. The literal, mechanical construction urged by the government yields an absurd result that could not have been intended by Congress. Thus, the court of appeals was justified in construing section 542(a) in accordance with the settled law of reorganizations, the policies of the Bankruptcy Code and the circumstances of its enactment.

4. Property seized in a pre-petition tax levy is subject to turnover since the language of section 542(a) of the Bankruptcy Code makes no distinction between the Internal Revenue Service and other creditors. Cases holding that the bankruptcy court lacked summary jurisdiction over such property in liquidating bankruptcies and Chapter XI proceedings under the Bankruptcy Act are inapposite. The new Bankruptcy Code contains both an express grant of turnover authority and expanded jurisdictional provisions that render the prior law irrelevant.

REASONS FOR DENYING THE PETITION

1. The principal reason cited by the government for this Court to grant its petition is its allegation that the decision of the court of appeals below squarely conflicts with the decision of the Fourth Circuit in *Cross Electric Co. v. United States*, 664 F.2d 1218 (4th Cir. 1981). This perceived conflict, however, is more apparent than real. Although in its decision below the Second Circuit stated that it was reaching "an opposite result" from the Fourth Circuit (App. A. to Petition, 2a), in actuality the underlying facts differ so substantially between the present case and *Cross Electric* as to make the two court of appeals decisions at most inconsistent, but certainly not opposite.

In *Cross Electric* the Fourth Circuit denied the turnover to the Debtor-In-Possession of an account receivable which had been levied upon by the IRS pre-petition. The outstanding tax indebtedness was more than seven times greater than the account seized. Therefore, the debtor had no equity in the seized assets. Nor could the debtor use, sell or lease the asset without actually consuming it. Relying on its earlier decision in *United States v. Eiland*, 223 F.2d 118 (4th Cir. 1955), the Fourth Circuit considered the pre-petition levy on an account receivable to be a "virtual transfer" of the indebtedness of the government.

In the present case, however, the property levied upon is principally equipment and inventory. The IRS would be required to go through extensive sale and public notice procedures in order to realize upon the assets. Under the relevant provision of the Internal Revenue Code, the debtor would retain various rights as the "owner" of the seized property until after the sale.[1] Also, as the bankruptcy court below found, the present debtor has substantial equity in the

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[1] Internal Revenue Code of 1954 §6337; 26 U.S.C. §6337.

seized assets, has a good prospect of being rehabilitated, needs the seized assets in order to do so, and the Internal Revenue Service can be adequately protected if a turnover is ordered.

The very lack of substantial conflict between the Fourth Circuit and Second Circuit decisions is manifested by the courts' respective definitions of the points at issue in the two cases. In *Cross Electric,* the court wrote that:

> "This case presents the issue whether *an account receivable,* levied upon by the Internal Revenue Service (hereinafter "IRS") prior to the date on which a debtor files a petition for reorganization, is "property of the estate" within the meaning of 11 U.S.C. §541 and thus subject to administration in the bankruptcy proceedings. We hold that, *under the facts of this case,* it is not".

Cross Electric Co. v. United States, supra, p. 1219. (emphasis supplied). Contrast this with the following statement by the Court below:

> The question on this appeal is whether a debtor in possession under Chapter 11 of the Bankruptcy Code of 1978 is entitled to an order, under §§542 or 543 of the Code, requiring the Internal Revenue Service (IRS) to turn over *tangible assets* of the debtor on which the IRS had levied pursuant to §6331 *et seq.* of the Internal Revenue Code (IRC).

United States v. Whiting Pools (App. A. to Petition, 2a) (emphasis supplied).

As the two courts of appeals did not purport to decide the same issue, it is difficult to conclude that the decisions of the courts squarely conflict as urged by the government. Accordingly, it is not necessary for this Court to grant the government's petition in order to resolve an alleged conflict between the circuits.

This absence of a conflict "on all fours", however, does not mean that the issue in this case is not a critical one in the

uniform administration of the bankruptcy laws throughout the country. It is respectfully submitted that, should this Court agree with the Second Circuit that, under appropriate factual circumstances, a bankruptcy court may order the Internal Revenue Service to turnover to a debtor-in-possession tangible assets which it had seized prior to a Chapter 11 petition, appropriate national uniformity could be achieved by a denial of the government's present petition or, preferably, by a summary affirmance of the decision below.

2. The government contends that the decision below is contrary to the plain meaning of the relevant statutory provisions and Congress' intent in enacting the new Bankruptcy Code. However, in our view, the court of appeals was correct in rejecting the overliteral, formalistic construction of the Bankruptcy Code urged by the government, in favor of a construction consistent with the purposes and policies of the statute as expressed in the legislative history. In construing the predecessors to the Bankruptcy Code, the Courts have traditionally eschewed "narrow formalistic interpretations which disregard the spirit and letter of the [statute]" (*Wright v. Union Central Life Insurance Co.*, 311 U.S. 273, 278 [1940]) and sought a construction which effectuates the general purpose and policy of the bankruptcy statute. See, e.g., *Lines v. Frederick*, 400 U.S. 18, 19-20 [1970]; *Segal v. Rochelle*, 382 U.S. 375, 379 [1966]; *Wright v. Union Central Life Insurance Co. supra*, p. 279; *Local Loan Co. v. Hunt*, 292 U.S. 234, 244-45 [1934]; *Maynard v. Elliott*, 283 U.S. 273, 277 [1930]. Although no reason appears for abandoning this approach in construing the language of the Bankruptcy Code, the government ignores the purposes and policies of the Code and argues in favor of an ahistorical and mechanical interpretation of the provisions relating to the turnover power of the Bankruptcy Court.

Under the government's construction of section 542(a) of the Bankruptcy Code,[2] the turnover obligation of a creditor in possession of the debtor's property is limited to a requirement that the creditor deliver to the trustee in bankruptcy all the debtor's *interests in the property* existent on the date the bankruptcy petition was filed. If this interpretation were correct, then the bankruptcy court would lack the power, even in a reorganization case, to displace a secured creditor in possession of property in which the debtor has an interest.[3] It follows that a creditor who, to recover an indebtedness totalling $1,000, obtains execution upon tangible property such as machinery or inventory worth $100,000 (and thereby precipitates the filing of a Chapter 11 petition) could not be compelled to surrender possession of that machinery or inventory to a reorganization trustee or debtor-in-possession regardless of the impact on the reorganization debtor's ability to continue in business or of the availability of "adequate protection" under sections 363(e) and 361 of the Bankruptcy Code. This curious construction of the statutory scheme would render §542(a) superfluous, except as a means of obtaining turnover from persons in wrongful possession of the debtor's property. More importantly, such a construction is in irreconcilable conflict with a clearly expressed legislative policy in favor of promoting successful business reorganizations.

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[2]Section 542(a) provides, in relevant part, that:

> "an entity . . . in possession, custody, or control, during the case, of property that the trustee may use, sell or lease under section 363 of this title, or that the debtor may exempt under section 522 of this title, shall deliver to the trustee, and account for, such property or the value of such property unless such property is of inconsequential value or benefit to the estate"

[3]The rule of *Cross Electric Co. v. United States*, 664 F.2d 1218, *supra*, has already been applied outside the context of a tax levy. See, *In re Campbell*, 20 B.R. 42 (Bankr. Ct. D.S.C. 1982). In *Campbell*, the bankruptcy judge held that an automobile repossessed by a secured creditor but not sold prior to the commencement of the case was not subject to turnover under section 542(a).

The House Committee Report accompanying H.R. 8200 states that the purpose of the business reorganization under the Code "is to restructure a business's finances so that it may continue to operate, provide its employees with jobs, pay its creditors, and produce a return for its stockholders" (H.R. Rep No. 95-595, 95th Cong., 1st Sess, 220, *reprinted in* 1978 U.S. Code, Cong. & Admin. News, 5963, 6179). Based upon the premise that assets used in an ongoing business are generally more valuable than those same assets when liquidated, the House Report made a legislative finding that "[i]t is more economically efficient to reorganize than to liquidate, because it preserves jobs and assets". H.R. Rep. No. 95-595, *supra*, at 220. The comments of the House sponsors of H.R. 8200 during floor debates are in the same vein; indicating a Congressional preference for business reorganizations over liquidations and a Congressional intent to encourage reorganization by incorporating the *combined* reorganization powers available under Chapters X, XI and XII of the Bankruptcy Act into a single reorganization Chapter under the Code.[4]

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[4]During the House debate on the Compromise bill, Representative Edwards, a House sponsor, stated that:

> "The amendment also encourages business reorganizations by a streamlined new commercial reorganization Chapter . . . It will protect the investing public, protect jobs, and help save troubled businesses".

(124 Cong. Rec. H 11089 [daily ed. Sept. 28, 1978]).

In debates prior to the initial passage of H.R. 8200, Representative Edwards explained the reasons for consolidation of the three reorganization chapters of the Bankruptcy Act of 1898 into a single Chapter 11 under the Bankruptcy Code:

> "Now for businesses, we make it easier for them to repay their creditors, too . . . [N]one of the three chapters offers the full scope of bankruptcy powers that a business could use to reorganize and repay its creditors rather than going into straight bankruptcy under which creditors usually get very little . . .
>
> We consolidate the three reorganization chapters into one flexible chapter. *It gives the debtors the combined powers of the three current chapters, and gives creditors the combined protection of the three chapters* . . . This way creditors get more than if the business went into straight liquidation.
>
> It also will save more businesses, which will protect jobs and protect public and private investors".

(123 Cong. Rec. H 11699 [daily ed. October 27, 1977] [emphasis added]).

Footnote continued on next page—

The government's reading of the statutory scheme conflicts with the Congressional intent to foster business reorganizations by placing property in the possession of a secured or executing creditor beyond the reach of the turnover power of the bankruptcy court. Obviously, the loss of tangible property to a particular secured creditor will diminish the chances that the debtor's business can continue to function. See, 6 *Collier on Bankruptcy*, ¶3.05, p. 431 (14th ed 1977). Where, as in the case at bar, the creditor is in possession of all the tangible assets of the debtor, the inevitable result will be business failure and immediate liquidation — to the detriment of the debtor, its creditors, its shareholders, and its employees.

In contrast, the construction placed upon the statute by the court of appeals is in harmony with the congressional policy favoring business reorganizations. A broad turnover power — under which third parties must surrender possession of all property in which the debtor has a legal or equitable interest — enables the debtor to use all of its assets in its attempt to continue in business. The interest of the secured or executing creditor in the debtor's property is preserved by the requirement of section 363(e) of the Bankruptcy Code[5] that the court be assured that there is "adequate protection" of each

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During these same debates, Representative Rodino, Chairman of the House Judiciary Committee, observed that "[f]or businesses, the bill facilitates reorganizations, protecting investments, and jobs". (123 Cong. Rec. H 11697 [daily ed. October 27, 1977]).

[5]Section 363(e) provides, in relevant part that:

> "on request of an entity that has an interest in property used, sold, or leased, or proposed to be used, sold, or leased, by the trustee, the Court shall prohibit or condition such use, sale, or lease as is necessary to provide adequate protection of such interest. . . ."

Section 361 of the Bankruptcy Code describes the means by which the Bankruptcy Court may provide adequate protection.

creditor's interest. As Congress intended, all concerned — the debtor as well as its creditors, shareholders and employees — benefit from the improved prospects for a successful reorganization.

3. The legislative history supports the Court of Appeals' construction of the relevant statutory provisions.

In construing any federal statute, the starting point must, of course, be the language employed by the Congress. E.g. *Reitman v. Sonotone Corp.*, 442 U.S. 330, 337 [1979]. Under the "plain meaning" rule of statutory construction, where the language is clear it must ordinarily be regarded as conclusive, absent a clearly expressed legislative intent to the contrary. E.g., *American Tobacco Co. v. Patterson*, ____ U.S. ____, 102 S.Ct. 1534, 1537 [1982]; *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 [1980]. But the plain meaning rule is "rather an axiom of experience than a rule of law", *Boston Sand Co. v. United States*, 278 U.S. 41, 48 [1928], and, as such, does not bar a Court from looking beyond the apparent meaning of the words of a statute upon superficial examination to consideration of the circumstances of the particular enactment. *Watt v. Alaska*, 451 U.S. 259, 266 [1981]; *Train v. Colorado Public Interest Research Group*, 426 U.S. 1,10 [1976]; *United States v. American Trucking Assns., Inc.*, 310 U.S. 534, 543-44 [1940].

Despite the assertions of the government to the contrary, the Court below did not violate the plain meaning rule by discerning the legislative intent from an analysis of the legislative history of the Bankruptcy Code. Upon careful examination, the statutory language contains an inherent ambiguity that cannot be resolved without reference to the legislative history.

Section 542(a) is silent on the critical question of whether turnover is required of all property in which the debtor has an interest or merely of all property interests of the debtor as of

the filing of a bankruptcy petition. The government reaches the latter result by reasoning that "property that the trustee may use, sell or lease under section 363 of this title" (11 U.S.C. §542[a]) is, by definition, "property of the estate" (11 U.S.C. §363[b], [c][1]), and that section 541(a) of the Bankruptcy Code, in turn, defines "property of the estate"[6] as including "all legal or equitable interests of the debtor in property as of the commencement of the case" (Petition pp 7-8). If the government's reasoning is correct, then section 542(a) literally requires an entity "in possession, custody or control" of the debtor's legal or equitable interests in property to "deliver" those interests to the trustee. But what possible meaning can be given to the words "possession, custody or control" when they are applied to an "interest" in property owned by the debtor, particularly to an equitable interest? The government's literal reading of section 542(a) yields an absurd result. No entity could have "possession" of an equitable interest owned by the debtor and no entity could "deliver" such an interest to the trustee. It is apparent from the use of the words "possession, custody and control" and "deliver" that the drafters of section 542(a) contemplated that the turnover power would be applied to *property* held by a third party in which the debtor has some legal or equitable property interest, rather than to the interest itself.[7] Where the literal import of the words of a statute leads

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[6]The phrase "Property of the estate" is not actually defined in section 541(a), although it is employed as the section heading. Section 541(a) merely enumerates the forms of property comprising the bankruptcy estate.

[7]Support for this construction can also be found in the House and Senate Reports, which, in describing the purpose of §542, state that:

> "Subsection (a) of this section requires anyone *holding property of the estate* on the date of the filing of the petition, or property that the trustee may use, sell or lease under section 363, to deliver it to the trustee". H.R. Rep No. 95-595, *supra*, at 369; S. Rep. No. 95-989, 95th Cong., 2d Sess., 84 [1978], *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 5870.

to absurd results, the Court must look to other indicia of legislative intent in construing the statute. See, *United States v. Bryan*, 339 U.S. 323, 338 [1950]; *United States v. Kirby*, 74 U.S. [7 Wall.] 482, 486 [1869]; 2A C. Sands, *Sutherland on Statutes and Statutory Construction*, §46.07, p. 65 (4th ed 1973).

In its analysis of the legislative history, the Court below found support of a broad turnover power implicit in the clearly expressed legislative intent to encourage business reorganizations, coupled with the fact that section 542 was added to the proposed bankruptcy legislation following legislative hearings in which several witnesses recommended that the turnover power available in reorganization proceedings under Chapters X and XII of the existing Bankruptcy Act be expressly incorporated into the new statute. *(United States v. Whiting Pools*, App. A. to petition, 17a-23a). In so doing, the Second Circuit considered the House Committee Report, but concluded that it contained language inconsistent with the government's narrow reading of the phrase "property of the estate" *(United States v. Whiting Pools*, App. A. to Petition 12a-13a, n.10). Having found the committee report ambiguous at best, the court of appeals was justified in looking to the congressional hearings for guidance, see, e.g., *Dawson Chemical Co. v. Rohm & Haas Co.*, 448 U.S. 176, 202-215 [1979], and in giving

> "consideration [to] the way in which Congress arrived at the statutory language [rather] than . . . trying to reconcile or establish preferences between the conflicting interpretations of the Act by individual legislators or the committee reports"

Corning Glass Works v. Brennan, 417 U.S. 188, 198 [1974].

Nevertheless, the government contends that the court of appeals erred by failing to give proper weight to statements in

the committee reports to the effect that section 541(a)(1)"is not intended to expand the debtor's rights against others more than they exist at the commencement of the case" (H.R. Rep. No. 95-595, supra, at 367; S. Rep. No. 95-989, supra, at 82) and to statements by the sponsors in debate to the effect that property becomes "property of the estate" under §541(a)(1) only to the extent of the debtor's interest in that property. (124 Cong. Rec. 32399, 33999 [1978]). These statements are not entitled to the controlling weight urged by the government because they relate to the composition of the bankrupt estate under section 541(a)(1) rather than to the turnover power under section 542(a) of the Bankruptcy Code.

Admittedly, section 541(a)(1) was not intended to expand the debtor's *rights* against third parties beyond those existing at the commencement of the case, but that is not to say that section 542(a) cannot alter the *remedies* available to the debtor. The cases have long distinguished between the deprivation of property *rights* of secured creditors by the bankruptcy courts, which would be unconstitutional, and the suspension of *remedies*, which is not. See, *Wright v. Union Central Life Ins. Co.*, 311 U.S. 273, *supra; Continental Illinois National Bank & Trust Co. v. Chicago, R.I. & P.Ry Co.*, 294 U.S. 648, 680-681 [1935]. Turnover pursuant to section 542(a) does not destroy the lien of the secured or executing creditor or deprive that creditor of its right to the value of the collateral up to the amount of the lien, since section 363(e) of the Bankruptcy Code imposes a mandatory requirement that the Court provide "adequate protection" of the creditor's rights. See generally, 2 *Collier on Bankruptcy* ¶363.06 (15th ed. 1982). Section 542(a) thus affects the remedies of the debtor without altering the debtor's or the creditor's rights.

Similarly, the scope of the turnover power under section 542(a) is not necessarily limited by a congressional intent that

the bankruptcy estate, by operation of section 541(a)(1), obtain no greater interest in property than the debtor had at the time the bankruptcy petition was filed. Both the House and Senate Reports stated that §541(a)(1) includes, as "property of the estate":

> property recovered by the trustee under section 542 of proposed Title 11, if the property received was merely out of the possession of the debtor, yet remained property of the debtor, (H.R. Rep. No. 95-595, *supra*, at 367; S. Rep. No. 95-989, *supra*, at 82).

Thus, the committee reports distinguish between possessary interests and other interests in property, and provide support for the proposition that while the bankruptcy trustee cannot obtain greater *ownership* interests than the debtor himself had, the trustee can obtain *possession* of property in which the debtor had an interest by exercising the turnover power.

Given the ambiguities in the statutory language and the legislative history, the court of appeals properly resorted to a broader consideration of legislative policy. See, *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 705-06 [1945]. Given the presumption that Congress is aware of the judicial construction of existing law, see, *Cannon v. University of Chicago*, 441 U.S. 677, 698-99 [1979]; *Shapiro v. United States*, 335 U.S. 1, 16 [1948], the court of appeals properly reasoned that Congress would not seek to reverse the leading reorganization case, *Reconstruction Finance Corporation v. Kaplan*, 185 F.2d 791 [1st Cir. 1950], without an explicit statement of Congressional intent. Given that the literal construction urged by the government yields an absurd result that is contrary to a clearly expressed legislative policy in favor of successful rehabilitation of business debtors, the court of appeals properly rejected that approach in favor of a construction in harmony with the purposes of the Bankruptcy Code.

4. The court of appeals correctly ruled that the turnover authority under section 542 of the Bankruptcy Code extends to tangible property seized in a pre-petition tax levy. The language of section 542 makes no differentiation between the Internal Revenue Service and other secured creditors subject to the turnover requirement.[8] Every "entity" in possession of the debtor's property must deliver it to the trustee. The government claims an entitlement to preferred treatment based upon case law decided under the former Bankruptcy Act, specifically *Phelps v. United States*, 421 U.S. 330, 335-336 [1975], and *In re Pittsburgh Penguins Partners*, 598 F.2d 1299 [3rd Cir. 1979], and the absence of a clear expression in the legislative history of the Bankruptcy Code of an intent to change the prior law.

Phelps and its progeny are irrelevant to the case at bar. *Phelps* stands for the proposition that, under the Bankruptcy Act of 1898, the bankruptcy court, in a liquidating bankruptcy, lacks summary jurisdiction over cash assets levied upon by the IRS because those assets are in the constructive possession of the IRS, an adverse claimant. 421 U.S. 330, 333-336, *supra*. In *Pittsburgh Penguins*, the Third Circuit applied the *Phelps* rationale and held that the adverse claim of the IRS deprives a Chapter XI court of summary jurisdiction over property seized by a pre-petition tax levy 598 F.2d 1299, 1302, *supra*. Unlike the case at bar, neither *Phelps* nor *Pittsburgh Penguins* involved a specific legislative grant of turnover authority to the bankruptcy court. Rather, both cases held the bankruptcy courts' extremely limited summary jurisdiction in liquidating and Chapter XI cases to be controlling. Had the IRS challenged the turnover power of the bankruptcy court in a Chapter X or Chapter XII proceeding, where section 257 or section 507 of the

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[8]Nor is there a discernible distinction between the status of a secured creditor holding repossessed collateral and that of the IRS holding seized property following a tax levy (Compare 26 U.S.C. §§6331-6344 with UCC 9-501 to 9-507).

Bankruptcy Act respectively provided just such an express grant of turnover authority,[9] a novel issue would have been raised as to whether, in a tax levy context, the turnover provision applied.[10] *Phelps* and *Pittsburgh Penguins* would not have been controlling in such a case, and thus cannot be deemed authority for the proposition that property seized in a tax levy is immune from the turnover power of the bankruptcy court where there is an express congressional grant of turnover authority, such as that provided in §542(a) of the Bankruptcy Code.

In enacting the Bankruptcy Reform Act of 1978, Congress not only superseded the relevance of *Phelps* and *Pittsburgh Penguins* by the express turnover provisions of 11 U.S.C.

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[9]Section 257 of the Bankruptcy Act (Act of July 1, 1898, ch. 541, §257, as added, Act of June 22, 1938, ch. 575 §1, 52 Stat 902; 11 U.S.C. 657) provided:

> "A trustee appointed under this chapter, upon his qualification, or if a debtor is continued in possession, the debtor, shall become vested with the rights, if any, of such prior receiver or trustee in such property and with the right to the immediate possession thereof. The trustee or debtor in possession shall also have the right to immediate possession of all property of the debtor in the possession of a trustee under a trust deed or a mortgagee under a mortgage".

Section 507 of the Bankruptcy Act (Act of July 1, 1898, ch. 541, §507, as added, Act of June 22, 1938, ch 575 §1, 52 Stat 927; 11 U.S.C. 907) provided:

> "Such prior proceeding shall be stayed by the filing of a petition under this chapter. The trustee appointed under this chapter, upon his qualification, or, if a debtor is continued in possession, the debtor, shall become vested with the rights, if any, of such prior receiver or trustee in such property and with the right to the immediate possession thereof. The trustee of debtor in possession shall also have the right to immediate possession of all real property and chattels real of the debtor in the possession of a trustee under a trust deed or a mortgagee under a mortgage".

[10]This precise question is unresolved, since no cases appear in which the IRS challenged the Courts turnover power in either a Chapter X or Chapter XII proceeding under the Bankruptcy Act.

§542(a) but also by granting the bankruptcy court exclusive jurisdiction over the debtors' property wherever located, under 28 U.S.C. §1471(e),[11] wherein jurisdiction no longer turns solely upon actual or constructive possession of the *res* or the consent of an adverse party. See, 1 *Collier on Bankruptcy* ¶¶3.01 [e]; 3.01 [g] (15th ed 1982); S. Rep. No. 95-989, *supra*, at 153; H.R. Rep. No. 95-595, *supra*, at 48-52; 445.

As both *Phelps* and *Pittsburgh Penguins* are premised upon these discarded jurisdictional distinctions, the court below was justified in disregarding those decisions. The court of appeals did not, as the government contends, change prior law — rather, it resolved a novel issue that had not been addressed in cases decided under the Bankruptcy Act.

CONCLUSION

The petition for a writ of certiorari should be dismissed; or, in the alternative, that the writ should be granted and the decision of the Second Circuit affirmed summarily on the opinion below.

Respectfully submitted,

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[11] 28 U.S.C. 1471(e) provides as follows:

"The bankruptcy court in which a case under Title 11 is commenced shall have the exclusive jurisdiction of all of the property, wherever located, of the debtor, as of the commencement of such case".